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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 465/2011*, **

Communication submitted by:	A.P.
Alleged victim:	The complainant
State party:	Finland
Date of complaint:	14 April 2011 (initial submission)
Date of present decision:	10 May 2017
Subject matter:	Deportation to the Russian Federation
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Torture, non-refoulement
Articles of the Convention:	3 and 22 (5) (b)

Background

1.1 The complainant is A.P., a citizen of the Russian Federation born in 1969. His request for asylum in Finland was rejected on 9 November 2010 and he fled to Sweden on 19 November, fearing a forcible removal to the Russian Federation. At the time of submission of the complaint, the complainant was residing in Sweden. He claims that his deportation would violate his rights under article 3 of the Convention. The complainant is unrepresented.

1.2 On 15 June 2011, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to issue a request for interim measures.

1.3 On 17 October 2011, the Committee decided, in accordance with rule 115, paragraph 3, of its rules of procedure, to examine the admissibility of the complaint together with its merits.

Factual background[1]

2.1 The complainant resided in St. Petersburg. Late in the night of 28-29 July 2007, while returning from a family celebration in an inebriated state, he was apprehended by policemen at the exit of a metro station. They asked him for his identity documents; a verbal conflict ensued because of the complainant's inebriation. As he did not have the

* Decision adopted by the Committee at its sixtieth session (18 April-12 May 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Kening Zhang.

[1] Reconstructed from the complainant's submissions and documents provided.

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identity documents with him, he was taken to a police station. On the premises, policemen verbally abused him and he was beaten with a truncheon. His arms were repeatedly twisted, which resulted in a serious fracture of his left shoulder and the dislocation of a finger on his right hand. He lost consciousness several times. He was also forced to sign two documents without reading them under threat of further beatings. He was released in the early morning of 29 July. As he was feeling unwell, he went to a first-aid post close to his residence, from where he was taken to hospital. He underwent surgery on his left shoulder on 2 August and 7 November 2007. Surgeons affirmed that the injury was typical police ill-treatment. Following the surgery, he went to the hospital for bandaging three times a week for 10 months.

2.2 On 12 September 2007, the complainant filed a complaint with the Office of the Prosecutor of the Kalininskiy District of St. Petersburg. Having received no reply, he submitted another complaint, to the Office of the Prosecutor of the City of St. Petersburg, on 4 December 2007. On 10 December, he received a decision from the district prosecutor's office, dated 11 October 2007, refusing to initiate criminal proceedings against the police on account of the absence of *corpus delicti*. According to the decision, the complainant was arrested under article 20.21 of the Code of Administrative Offences (appearing in public places in a state of alcoholic intoxication). He acknowledged that he could have had a conflict with the policemen because of the inebriation. According to police records and the explanations of an on-duty policeman, B., the complainant was admitted to the Kalininskiy district police station on 29 July 2007 at around 1.25 a.m. and released at 3.25 a.m. Arrest and administrative offence reports were drawn up, no physical force or special means were used against him and he did not ask for medical assistance.

2.3 In January 2008, the complainant's mother contacted a media agency. On 10 March, an article about the complainant's case, titled "My son became disabled after beatings in a police station", was published in the weekly newspaper *Smena*. The complainant's real name was not used.

2.4 On 26 February 2008, the complainant filed a second complaint with the district prosecutor's office. He was warned that making false allegations might constitute a crime under article 306 of the Criminal Code.

2.5 On 18 August 2008, the complainant left the Russian Federation without waiting for a reply from the prosecutor's office. On 25 August, when he was in Norway, an unknown person told his mother on the telephone to have the complaint withdrawn, or the complainant would have problems.

2.6 On an unspecified date, the complainant arrived in Finland and submitted an application for asylum and a residence permit. On 3 May 2010, the Immigration Service rejected his application, indicating, inter alia, that the complainant had not exhausted the available domestic remedies in the Russian Federation with regard to his allegations of torture and that his passport contained records of his previous travel to Finland, which would have been impossible should he be a victim of persecution by the Russian Federation police and authorities. The Immigration Service considered that the complainant did not substantiate the risk of torture in case of deportation and found no grounds for granting a residence permit.

2.7 On 24 June 2010, the complainant appealed to the Helsinki Administrative Court. On 9 November, the Court upheld the decision of the Immigration Service. On 19 November, his lawyer informed him of the decision by telephone. Thereafter, the complainant received notification that he would be deported to the Russian Federation. He claims that it was impossible for him to file an appeal with the Helsinki Supreme Administrative Court because there was no time to do so before the scheduled deportation. Furthermore, such an appeal would have no suspensive effect. It would be impossible for him to submit it without a lawyer as appeals have to be drafted in Finnish, which he does not speak. Therefore, he contends that all available domestic remedies have been exhausted.

2.8 Facing deportation and fearing for his life, the complainant fled to Sweden on 19 November 2010 and filed an application for asylum there on 26 November. His application was rejected by the Swedish Migration Board on 21 January 2011 and, in accordance with the Dublin II Regulation, he faced deportation to Finland. The complainant appealed the

decision of the Swedish Migration Board on 11 February. He is currently in hiding in Sweden.

2.9 The complainant experienced high-level stress and depression in view of the possibility of his deportation to the Russian Federation. Later, when the stress eased, he recalled that he had participated in the dissenters' march, a series of opposition protests, in March and April 2007 in St. Petersburg. During the demonstration he was stopped by policemen who checked his identity documents and recorded something. The complainant claims that his mistreatment in July 2007 is related to his participation in the opposition protests.

The complaint

3. The complainant claims that his deportation to the Russian Federation would violate his rights under article 3 of the Convention because he would be at risk of being tortured and persecuted upon return in the light of the mistreatment he suffered in the past and his complaints about the actions of the police. In support of his allegations, he refers to his medical reports and reports on the human rights situation in the Russian Federation, "where torture by the police is a common practice".

State party's observations on admissibility

4.1 On 12 August 2011, the State party submitted its observations on admissibility. It states that the complainant arrived in Finland on 18 March 2009 and requested asylum. On 3 May, the Immigration Service rejected his request and ordered his return to the Russian Federation. This decision was upheld by the Administrative Court of Helsinki on 9 November 2010.

4.2 The State party notes that, according to section 22 of the Administrative Judicial Procedure Act (586/1996), appeals should be lodged within 30 days of notice of the decision. Although the date of notice to the complainant does not appear in the documents, according to the provision, he would have had time to lodge his appeal at least until 9 December 2010, i.e., within 30 days of the Administrative Court's decision of 9 November. As the complainant claims that he learned about the decision on 19 November, the deadline for filing an appeal would have been extended accordingly. However, he never sought leave from the Supreme Administrative Court to appeal. Moreover, he has not, at any stage of the domestic asylum proceedings, requested the courts to suspend his deportation.

4.3 In the light of the foregoing, the complainant has not exhausted all available domestic remedies, as required under article 22 (5) (b) of the Convention, and, hence, his complaint should be declared inadmissible.

Complainant's comments on admissibility

5.1 On 3 October 2011, the complainant submitted his comments on the State party's observations on admissibility. He submits that the Administrative Court's decision of 9 November 2010 was read to him on the telephone by his lawyer, who informed him that the appeal had been rejected and that the deportation procedure had been launched and would not be suspended. The lawyer also informed him that no further appeals could be submitted from Finland, owing to the imminent character of his deportation and the lack of time for submission of an appeal. Therefore, it was absolutely impossible for him to file an appeal with the Supreme Administrative Court ("the second appeal"), and it would be ineffective to file such an appeal from the Russian Federation after his deportation.

5.2 The complainant therefore challenges the State party's argument that he has not exhausted all available domestic remedies. Furthermore, he recalls that the requirement of exhaustion of domestic remedies does not apply if domestic remedies are unavailable or unlikely to bring effective relief. He insists that his case falls under this exception[2] and believes that, by registering his complaint, the Committee has given due weight to his

[2] The complainant does not explain whether he considers that the domestic remedies were unavailable or unlikely to bring effective relief in his case.

allegations. He claims that he did not file the second appeal because he was not given an opportunity to do so and the State party did not assign a lawyer to assist him.

5.3 The complainant further submits that leave to appeal to the Supreme Administrative Court is granted only if new circumstances emerge in a case. Such circumstances could not be identified at that point but only emerged later, owing to the stress and depression he experienced after the rejection of his first appeal and the unlikelihood that the second appeal would be successful in view of his imminent deportation.

State party's observations on the merits

6.1 On 20 December 2011, the State party presented its observations on the merits. It notes that under section 87 (1) of the Aliens Act, asylum is granted on the basis of a well-founded fear of persecution based on ethnic origin, religion, nationality, membership in a particular social group or political opinion to aliens who, because of this fear, are unwilling to avail themselves of the protection of their home country. Under section 88 (1), if the requirements of section 87 are not met, subsidiary protection may be granted if substantial grounds have been shown for believing that aliens, if removed, would face a real risk of being subjected to serious harm and would be unable or unwilling to avail themselves of the protection of that country. Serious harm means: (a) the death penalty or execution; (b) torture or other inhuman or degrading treatment or punishment; (c) serious and individual threat as a result of indiscriminate violence in situations of international or internal armed conflicts. Section 88a (1) lists grounds for humanitarian protection if requirements under sections 87 (1) and 88 (1) are not met: an environmental catastrophe; a bad security situation due to an international or internal armed conflict; or a poor human rights situation. Furthermore, according to section 52 (1), aliens may be issued residence permits on compassionate grounds, including health, ties to Finland, vulnerability, or circumstances they would face in their home country. The non-refoulement guarantee is enshrined in section 147. According to section 200, in general, a decision on removal may not be enforced until a final decision has been issued on the matter. Applying for leave to appeal from the Supreme Administrative Court does not prevent the enforcement of a decision unless otherwise ordered by the Court. However, a final decision or a decision that is otherwise enforceable may not be enforced if there is reason to believe that the removal may expose the alien to danger as referred to in section 147.

6.2 The State party refers to the reasoning of the Immigration Service in its decision of 3 May 2010 to reject the complainant's asylum request. First, the Immigration Service considered that he could still seek the protection of the Russian Federation authorities because he had not specified the outcome of his complaints to the prosecuting authorities filed on 4 December 2007 and 26 February 2008; neither had he indicated that his case had been closed. Second, the Immigration Service considered that there was a possibility for the complainant to relocate within the Russian Federation and that his international travel in 2006 and 2007 demonstrated that he was able to leave the country without obstacles and therefore he did not require international protection.[3] The Immigration Service found that the complainant had no justifiable grounds for fearing persecution, being subjected to serious harm, or being granted humanitarian protection or a permit on compassionate grounds under sections 87 (1), 88 (1), 88a (1) and 52 of the Aliens Act. The Immigration Service considered that his return to the Russian Federation would not be in breach of article 3 of the Convention because there was no risk that he would be subjected to inhuman treatment there or moved to other areas where he would be at risk of such treatment.

6.3 On 9 November 2010, the Administrative Court rejected the complainant's appeal, stating that the Russian Federation authorities were not generally incapable of providing effective protection, even if some police and other authorities were corrupt and could commit crimes. It was the complainant's duty to avail himself of the protection of higher authorities when he considered that the subordinate authorities had infringed the law. He had filed two complaints alleging misconduct by policemen. He did not complain before

[3] His passport was stamped at the Nuijamaa and Vaalimaa border crossing points in 2006 and 2007, and on 13 and 19 October 2007 and 12 June 2008.

the district prosecutor's office that the authorities had refused to examine his complaint, nor did he present other evidence to support his suspicion that he would not be able to turn to higher judicial authorities in the Russian Federation. The Administrative Court found that the decision not to grant a residence permit to the complainant could not be regarded as manifestly unreasonable and that the removal order was justified.

6.4 The State party submits that the Finnish authorities found no substantial grounds for believing that the complainant would be at risk of torture as defined in article 1 of the Convention and referred to paragraph 1 of the Committee's general comment No.1 (1997) on the implementation of article 3. The State party reiterates that the complainant has not requested leave to appeal from the Supreme Administrative Court and thus failed to exhaust all domestic remedies in the case. Therefore, the complainant has failed to establish an arguable case on admissibility and the merits. The case should therefore be declared inadmissible under article 22 (5) (b) of the Convention. Alternatively, should the case be found admissible, an examination of the merits would find that there has been no violation of article 3 of the Convention in this case.

Complainant's comments on the State party's observations on the merits

7.1 On 14 February 2012, the complainant challenged the State party's arguments on inadmissibility, reiterating that he did not file an appeal to the Supreme Administrative Court because the Finnish authorities did not allow him to do so. With reference to article 22 (5) (b) of the Convention, he states that the exhaustion of the domestic remedies rule does not apply if the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief.

7.2 He claims he would be persecuted if returned to the Russian Federation because of his complaints about police misconduct. He recalls that he was threatened with repercussions if he did not withdraw his second complaint and was warned that false accusations constituted a crime. He should have been granted asylum on the basis of section 88 (2) (subsidiary protection), as there exists a risk to his life and a risk of torture in his home country, and section 88a (humanitarian protection) because of the poor human rights situation there, as demonstrated by recent international reports. He adds that his arrest and mistreatment by the police on 29 July 2007 is explained by his participation in the dissenters' march in April. Hence, he was a victim of political persecution, in which case sections 87 (acts of persecution), 88a (humanitarian protection) and 147 (non-refoulement) are applicable. Furthermore, owing to a serious and persistent pain in his left arm, he should have fallen under the protection of section 52 (issuing residence permits on compassionate grounds).

7.3 The complainant stresses that his first complaint to the district prosecutor's office was processed three months after its submission; the refusal to initiate criminal proceedings was backdated to 11 October 2007 because he was provided with the decision only on 10 December. He claims that his case was not given serious consideration. He was not kept informed of the progress of the investigation in relation to his second complaint of 26 February 2008 until his departure from the Russian Federation on 18 August. He did not have the time or energy to follow up the case with the prosecutor's office. He is convinced that the threatening telephone call received by his mother after his departure related to a periodic check-up by the district prosecutor's office and the intensification of the investigation into his case. Lawyers in the Russian Federation told him that one cannot win a case against the police. He adds that allegations of torture by the police that are given serious consideration may become life-threatening for complainants, as in his case. The Finnish authorities ignore cases of mistreatment by police in the Russian Federation. He describes a recent death due to torture in a police station in St. Petersburg.

7.4 The complainant explains that relocation within the Russian Federation would not be an acceptable alternative to him as it would involve a declaration of removal and registration of residence in local police stations. Furthermore, he would be questioned when crossing the border and his name would be checked against a database of the ministry of internal affairs, owing to his prolonged absence. There would be a risk that he would not arrive home safely. Moving residence is time-consuming and he would be vulnerable throughout the process, given the background of his case. Moreover, he would need to

reside at his former home in order to receive information on the progress of the investigation in relation to his complaints, as the case is territorially bound to St. Petersburg. Furthermore, he explains that his past travel to Finland was before the situation became threatening.

7.5 According to the complainant, his asylum request was justified, supported by the fact that he was considered an asylum seeker for 18 months whereas ill-founded cases are dismissed within three weeks and followed by deportation within eight days. His lawyer confirmed that the Immigration Service had accepted his account of the events. Its decision contained the following statement: "The applicant justified his asylum request based on violence and torture by the authorities." He does not know why he was not granted asylum in the circumstances, despite the supporting documents, the names of the investigators processing his complaints and the name of the on-duty police officer at the police station where he was tortured. He is surprised that the Finnish authorities inquired with the Russian Federation authorities whether the complainant risked torture in the Russian Federation. He claims that this creates an additional risk for him as his confidentiality was not respected, and that this constitutes a violation of his rights and of migration legislation, and as such is an additional ground for granting him asylum.

7.6 Challenging the State party's assessment of the risk of torture upon removal under general comment No. 1 (1997), the complainant submits that there is a pattern of human rights violations in the Russian Federation which is not improving, specifically with regard to freedom of expression; that he was tortured on the night of 28-29 July 2007; that he provided medical evidence in support of his claim, including X-rays from the Russian Federation and Finland, dated 2009.[4] He also appends a press article about the murder of an arrested teenager by a policeman in St. Petersburg.

7.7 On 20 March 2012, the complainant provided additional information about the mistreatment of several persons by policemen in four regions of the Russian Federation. One case resulted in death. In his view, this confirms the claim that he would not be protected from police misconduct in his home country.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of said remedies has been unreasonably prolonged or is unlikely to bring effective relief. The Committee notes that in the present case, the State party argues that the complainant has not availed himself of leave to appeal from the Supreme Administrative Court and has never asked the domestic courts to suspend his deportation. The Committee notes the complainant's challenge to the State party's argumentation, particularly on the ground that lodging such an appeal would not have suspended his imminent deportation and therefore it would have been ineffective to file it after the deportation.

8.3 The Committee observes that it has not been disputed by the State party that an application for leave to appeal from the Supreme Administrative Court has no suspensive effect unless, according to section 200 of the Aliens Act, there is reason to believe that the removal may expose the alien to a risk of death, torture, persecution or other treatment

[4] A medical certificate dated 10 June 2009 by a Finnish surgeon and an adduced X-ray, on file, testify to the absence of a ball-and-socket joint and damage to a muscle in the complainant's left arm, as a result of which he has difficulty lifting his arm, has acute pain and takes painkillers.

violating human dignity. Furthermore, the State party has not explained the possibility for seeking suspension under Finnish law and how, in practice, it could have been applied in the complainant's case, particularly in the light of the assessment by the domestic authorities that the risk that he would be subjected to torture upon return to the Russian Federation was not established. The Committee further notes the complainant's contention that an application for leave to appeal should be submitted in Finnish, which he does not speak; that he did not benefit from legal assistance to prepare it within a very limited time before the deportation; and that, in any event, leave to appeal to the Supreme Administrative Court is granted only if new circumstances emerge in a case, which did not exist in his case at the relevant time. In the circumstances, the Committee considers that the complainant's failure to apply for leave to appeal before the Supreme Administrative Court does not constitute an obstacle to the admissibility of the complaint.

8.4 As the Committee finds no further obstacles to admissibility, it declares the communication submitted under article 3 of the Convention admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22 (4) of the Convention.

9.2 With regard to the complainant's claim under article 3 of the Convention, the Committee must determine whether there are substantial grounds for believing that he would be personally in danger of being subjected to torture should he be returned to the Russian Federation. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned.[5] It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

9.3 The Committee recalls its general comment No. 1 (1997) in the context of article 22 (refoulement and communications), according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.[6] The Committee further recalls that, in accordance with its general comment No. 1 (1997), it gives considerable weight to findings of fact that are made by organs of the State party concerned,[7] while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

9.4 The Committee takes note of the claim that the complainant was arrested and ill-treated by the police in St. Petersburg in July 2007, which, according to him, resulted in a fractured shoulder and a dislocated finger. It notes that the complainant underwent surgery twice in this connection and submitted medical evidence. It also notes the complainant's contention that the police mistreatment is explained by his participation in the opposition

[5] See, inter alia, communication No. 470/2011, *X. v. Switzerland*, decision adopted on 24 November 2014, para. 7.2.

[6] See, inter alia, communications No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003 and No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005.

[7] See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

dissenters' march in the spring of 2007. He lodged three complaints with the Russian Federation prosecuting authorities in connection with the police mistreatment. The Committee notes, however, that none of them specified the alleged connection between his mistreatment and participation in the opposition movement.

9.5 The Committee further notes that, even if it were to accept the claim that the complainant was subjected to torture and/or ill-treatment in the past, the question is whether he remains at risk of torture in the Russian Federation in case of forcible return there. It notes that the complainant submitted that such a risk existed for him, particularly because of his complaints about the police mistreatment, the telephone call in August 2008 threating him with harm if he did not withdraw his complaint, the newspaper article about his case published in March 2008 and his participation in the opposition rally in 2007. The Committee notes, however, that the complainant has not put forward any evidence that the Russian Federation authorities have been looking for him following his departure from the country in August 2008 and would target him, in particular because of his affiliation with an opposition movement, if he were to be returned. In this connection, the Committee notes that it does not appear from the complainant's submission that he was a high-profile opponent, that his role in the spring protests went beyond joining the marches on two occasions, or that he was politically active after his departure from the Russian Federation in August 2008. The Committee also notes that the complainant has not disputed that he travelled from the Russian Federation to Finland and back several times after his participation in the dissenters' march and the alleged police mistreatment in 2007 and shortly before his flight to Finland in 2008. It also notes that the Finnish authorities that examined his asylum application found that he had failed to establish that he would be at risk of being subjected to persecution, torture or inhuman treatment upon return to the Russian Federation.

9.6 The Committee recalls that the risk of torture must be assessed on grounds that go beyond mere theory, and that it is generally for the complainant to present an arguable case.[8] In the light of these considerations, and on the basis of all the information submitted by the complainant and by the State party, including on the human rights situation in the Russian Federation, the Committee considers that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

10. The Committee, acting under article 22 (7) of the Convention, therefore concludes that the complainant's expulsion to the Russian Federation would not constitute a breach of article 3 of the Convention.

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[8] See, inter alia, communications No. 298/2006, *C.A.R.M. and others v. Canada*, decision adopted on 18 May 2007, para. 8.10; No. 256/2004, *M.Z. v. Sweden*, decision adopted on 12 May 2006, para. 9.3; No. 214/2002, *M.A.K. v. Germany*, decision adopted on 12 May 2004, para. 13.5; No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.3; and No. 347/2008, *N.B.-M. v. Switzerland*, decision adopted on 14 November 2011, para. 9.9.